DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CACR05-1008

JUNE 28, 2006

APPEAL FROM THE LOGAN COUNTY CIRCUIT COURT
[NO. CR2003-109]

DORIS M. FRANKLIN
APPELLANT

HON. PAUL DANIELSON, JUDGE

V.

AFFIRMED

STATE OF ARKANSAS
APPELLEE

On May 19, 2005, a Logan County jury found appellant Doris M. Franklin guilty of possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and intentional use of a communication facility. The jury sentenced her to serve thirty years' imprisonment, including a consecutive ten-year enhancement[1] on the first conviction. In a per curiam handed down on May 11, 2006, the Arkansas Supreme Court granted appellant's motion for belated appeal of an order denying her motion for a new trial. Upon appeal to this court, appellant raises four points: (1) the trial court erred in joining her case with her co-defendant's where a conflict in defenses existed and inflammatory evidence pertaining only

[1]Appellant violated Ark. Code Ann. § 5-64-411 in that she possessed methamphetamine with the intent to deliver within 1000 feet of a church.

to her co-defendant would be introduced; (2) the trial court erred in denying her motion for a new trial because she was not advised of her right to consular communication; (3) the trial court erred in appointing an unqualified public defender to represent her; (4) the trial court erred in denying her motion for a new trial where she was deprived of her constitutional right to effective assistance of counsel. We affirm.

Because the sufficiency of the evidence is not challenged on appeal, the facts will be briefly stated. Following a controlled drug buy, authorities in Logan County sought and were issued a search warrant on the residence belonging to appellant and her husband and co-defendant Robert Franklin. Authorities executed the search warrant on November 28, 2003, and seized incriminating evidence from the home as well as methamphetamine on appellant's person.

Joinder of Defendants

Appellant and her husband were charged by separate informations. On February 4, 2005, the State filed a motion requesting that appellant's case be joined for trial with her husband's case because the State alleged that the charged offenses were based on the same conduct and arose from the same criminal episode. The trial court granted the State's motion, and appellant and her husband were tried together on May 16, 2005.

Appellant argues that Ark. R. Crim. P. 21.2 does not specifically allow the joinder of defendants charged by separate informations. She also points out that the trial court granted her attorney's motion to withdraw from representing both her and her husband because the

trial court found that a conflict existed between the defendants' defenses. Appellant contends that a fair determination of her guilt or innocence could not be made because evidence in the form of a CD-ROM depicting her husband engaged in a drug transaction with a female, with whom he thereafter immediately had sexual intercourse, inflamed the jury against her as well. Appellant did not object to the State's motion for joinder and did not make a motion for severance. Severance is waived if the motion is not made at the appropriate time. Ark. R. Crim. P. 22.1(a). Even if one has the right to sever, that right can be waived, and the issue cannot be raised for the first time on appeal. *Thompson v. State*, 338 Ark. 564, 999 S.W.2d 192 (1999). Although our supreme court granted appellant's motion for a belated appeal of the denial of her motion for a new trial, in which she raised this issue, the trial court addressed the matter only in the context of her ineffective-assistance-of-counsel claim.

Consular Communication

Appellant, a resident alien and citizen of the Republic of Germany, argues that, upon her arrest and incarceration, she was not informed of her right to consular communication under the provisions of the Vienna Convention on Consular Relations, which she contends would have included the services of an interpreter. Appellant argues that it is clear that she did not fully understand what was being said to her regarding consular communication, which she avers cannot be considered a waiver of her right.

The following colloquy occurred prior to trial:

BY MR. WELLS: Also for the record, your Honor, I just wanted to state that Mrs. Franklin is a German national and as we spoke in chambers earlier she has not spoken with the German consulate or sought the opportunity to do that. But I just wanted to make the Court aware of that.

BY THE COURT: Well, I understand that you advised her that she could do that and she did not want to do that, is that my understanding?

BY MR. WELLS: That's correct.

BY THE COURT: You chose not to do that.

BY MRS. FRANKLIN: To what?

BY MR. WELLS: To speak to the German consulate.

BY MRS. FRANKLIN: I got a – it's called a resident – residential alien card and it says I'm a permanent resident of the United States.

BY THE COURT: So it was your choice not to contact them. You knew that you could.

BY MRS. FRANKLIN: He told me about it Friday, but might not (inaudible) on Friday.

BY MR. WELLS: No, we spoke about it probably two – about a week and a half ago when I first realized you were a German national. We talked about it again Friday also.

BY MRS. FRANKLIN: I recall Friday, you know.

BY THE COURT: In any case you didn't want to do that?

BY MRS. FRANKLIN: I guess not, no.

The Vienna Convention on Consular Relations ("VCCR") is a multinational treaty signed by the United States, which provides foreign detainees with a right to certain consular functions. In *Mezquita v. State*, 354 Ark. 433, 125 S.W.3d 161 (2003), Mezquita argued that

the police had failed to inform him of his rights under the VCCR. Our supreme court held that Mezquita had waived the argument when he failed to obtain a ruling from the trial court as to whether he was in fact "detained." Unfortunately for this court's review of the case at bar, our supreme court further held that the remainder of Mezquita's arguments regarding the scope of the VCCR and the remedy for its violation were thus rendered moot. In *Medellin v. Dretke*, 544 U.S. 660 (2005), the United States Supreme Court dismissed a writ of certiorari addressing the denial of a certification of appealability (COA) by the Fifth Circuit Court of Appeals on habeas petitioner's VCCR claim as improvidently granted. In other words, this court is without any precedent regarding procedural bars under the VCCR. Accordingly, this court holds that appellant effectively waived her right to consular communication at the point at which she told the trial judge that she was told of her right but that she chose not to exercise it. *See Green v. State*, ___ Ark. ___, ___ S.W.3d ___ (Mar. 9, 2006) (holding that even constitutional arguments can be waived). We note that, although appellant later raised the consular-communication issue in her motion for new trial and testified on that issue at the hearing on her motion, she did not obtain a ruling. *See Mezquita*, *supra*. In its order denying appellant's motion, the trial court addressed only the ineffective-assistance-of-counsel claim and did not even refer in that context to defense counsel's alleged failure to inform appellant of her right to consular communication.

Unqualified Public Defender

Appellant was initially represented by attorney Bill Strait, but attorney John R. Irwin was substituted for him. On February 14, 2005, John R. Irwin moved to be relieved as counsel for appellant based on his statement that a conflict existed in representing both defendants. The trial court granted John R. Irwin's motion on February 18, 2005, and appointed attorney Seth Irwin. In an order entered on May 5, 2005, the trial court substituted attorney Corey Wells for Seth Irwin.

Appellant argues that appointing Wells as her attorney violated the rules of the Arkansas Public Defender Commission because he was not qualified to represent her. She contends that Wells had been out of law school less than a year, had received no continuing education hours in the field of criminal law, had never tried a misdemeanor case to its conclusion in district court or circuit court, had never tried a felony of any class to its conclusion in circuit court, and had never tried a civil jury case to completion by verdict. Appellant also contends that Wells never practiced primarily in the field of criminal litigation. On this point, we simply note that this court is guided by the Arkansas Rules of the Supreme Court and Court of Appeals and not by the Arkansas Public Defender Commission's rules. Our rules do not require that counsel be qualified pursuant to the standards set forth by the Commission. In any event, this point is raised as part of appellant's next point.

New Trial - Ineffective Assistance of Counsel

At the hearing on appellant's motion for new trial, Wells testified that he is a public defender who was appointed to represent appellant and that he had reviewed her case file and spoken to her on many occasions regarding the facts of the case. Wells testified that he contacted four other attorneys in order to speak about the case and his judgment calls in order to be prepared for what was his first trial. Wells stated that he spoke with appellant over the telephone about who her potential witnesses were going to be but that he did not interview them before the day of trial. Wells testified that he called two witnesses on appellant's behalf but, after their testimony, he made a tactical decision not to call appellant's third witness. He stated that he had discussed appellant's nationality with her prior to trial and told her she had the right to speak with a German consulate but that she told him she was not interested in doing that on two occasions. Wells stated that he did not directly ask appellant whether she understood English because she spoke English plainly and always indicated that she understood what was being said. He testified that, when he learned that the trial court had granted the State's motion for joinder, he was not necessarily opposed to joinder because he thought it could work to appellant's benefit. Wells stated that, before the CD-ROM was introduced at trial, he reviewed it and did not object to its introduction because the CD seemed to vindicate his client and show that appellant's husband was selling drugs and because Wells thought the jurors might sympathize with his client. Wells testified that he told appellant that she had the right to testify but that he thought it was better that she not testify after she told him she had sold drugs. Wells stated that appellant then chose not to

testify at her criminal trial. Wells was questioned about his certification pursuant to the Arkansas Public Defender Commission, and he stated that he did not fill out an application but that he was interviewed prior to being appointed on April 25, 2005. Wells stated that he discussed with appellant what he thought was "a gold plea agreement" and advised her that it would be in her best interest to take it. Wells stated that he raised an objection at trial and joined some of the objections of co-defendant's counsel.

Two attorneys, Mike Allison and Ernie Witt, testified regarding public-defender certification and the standard for attorneys, respectively. Although appellant proffered the Arkansas Public Defender Commission rules, the trial court did not admit the rules into evidence because appellant did not have someone who was qualified to testify as to the rules and the ramifications of violating those rules.

Judy Davis, an employee of the adult education program at Arkansas Tech University's Ozark campus, testified regarding appellant's test scores. According to Davis, appellant's test scores placed her at fourth- and fifth-grade levels.

At the posttrial hearing, appellant testified that her nationality is German, that she had been in the United States for fourteen years, and that she sometimes understood English. Appellant testified that Wells told her she would have to testify *against* her husband but that she refused to testify against him despite the fact that they were separated at that time. Appellant testified that she was afraid of her husband because he yelled and threw things, but she conceded that she never told Wells of that fear. Appellant stated that she would have told

the jury that her husband was abusive and "made her do things" and that she had long since quit using drugs after her estrangement from him. Appellant admitted that she knew her husband sold drugs, but she denied that she ever sold drugs and denied that she told Wells she did so. She stated that when the police arrived at her residence with a search warrant, her husband told her to get rid of the "stuff" and that she put the methamphetamine into her pocket and pants.

Lorene Farley, appellant's friend for five years, testified that she and appellant had worked together and visited each other's homes. She stated that Wells did not interview her and did not call her as a witness at trial. Farley stated that she would have testified that appellant and Robert Franklin did not speak to each other and that Franklin had a temper. She stated that she would have also told the jury that appellant had not used drugs in the months prior to trial. Farley admitted that she had been convicted of a drug crime for which she received probation.

Appellant was recalled to the stand where she testified that she probably would have contacted the consulate when she was first arrested. She conceded that the trial court had asked her prior to trial whether she wanted to talk to the German consulate, but she stated that Wells had angered her by essentially calling her a liar and that she did not understand the proceedings.

In its order filed on July 18, 2005, denying appellant's motion for new trial, the trial court addressed her motion as though her motion contained only the ineffective-assistance-

of-counsel claim. It found that Wells communicated with appellant at least six times before trial; that Wells discussed the testimony of appellant's potential witnesses with her and that, for tactical reasons, all but one testified at trial; that Wells explained his reason for not objecting to the CD-ROM evidence in that he believed it seemed to vindicate his client; that Wells also explained that he did not object to joinder of the cases because he thought it would benefit appellant; that Wells advised appellant not to testify based on her statement to him that she sold drugs; and that Wells was licensed by the Arkansas Supreme Court and, prior to obtaining his license, he was a Rule 15 law student who worked for the Public Defender Commission in Pulaski County.

In her brief on appeal, appellant describes her repeated attempts to contact Wells upon receiving notice of his appointment. She states that she was first successful in contacting Wells on May 4, 2005, when she tracked him down at the Paris Courthouse. Wells told her to call him the next day, which she did. She states that Wells told her he needed additional time to review her file and to contact him on Monday, May 9. She called Wells on Monday, but, according to her, he only wanted to talk about accepting a plea, which she refused. She contends that Wells promised to get back with her, and on May 13, he called her three times, but again wanted to talk about accepting a plea by telling her of the possibility of enhancement for the locality of the alleged crime. She states that Wells contacted her by telephone again on May 15, but he only wanted to talk about punishment and the plea offer.

On appeal, appellant argues that Wells was ineffective in the following ways: (1) he did not meet the criteria and requirements of the Arkansas Public Defender Commission; (2) he did not adequately prepare for trial in that he did not consult meaningfully with her prior to trial, did not review the evidence, and did not interview any potential witnesses; (3) he failed to object to the joinder of her case with that of her husband's and did not move for severance where the joinder allowed introduction of inflammatory evidence against her husband; (4) he did not properly advise her of her right to testify, and she asserts that she would have provided meaningful testimony; (5) he did not object to the CD-ROM evidence, which would not have been admissible against her individually and did not go to her guilt; (6) he did not request an interpreter for her prior to trial even though her grasp of the English language was limited and she tested at only a 4.9-grade level.

This court will not consider ineffective assistance as a point on direct appeal unless that issue has been considered by the trial court. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004). While Rule 37 of the Arkansas Rules of Criminal Procedure generally provides the procedure for postconviction relief due to ineffective counsel, we will address this issue on direct appeal provided that it was first raised during trial or in a motion for a new trial and provided that the surrounding facts and circumstances were fully developed either during the trial or during other hearings conducted by the trial court. *McClina v. State*, 354 Ark. 384, 123 S.W.3d 883 (2003). Here, the ineffective-assistance-of-counsel claim was fully developed before the trial court, and it is therefore properly before us on appeal.

Our supreme court in *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999), set forth our standard of review for ineffective-assistance-of-counsel claims when it stated:

> We measure the effectiveness of trial counsel according to the standard enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). According to that standard, the petitioner must show first that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. The petitioner must show there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. In making a determination on a claim of ineffectiveness, the totality of the evidence before the judge or jury must be considered.

338 Ark. at 385, 993 S.W.2d at 907.

This court will not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Johnson v. State*, ___ Ark. ___, ___ S.W.3d ___ (May 4, 2006). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

We recognize that appellant is entitled to the benefit of effective assistance of counsel. *See Haynie v. State*, 257 Ark. 542, 518 S.W.2d 492 (1975). However, we have held that the

defendant shoulders the burden of demonstrating that his counsel's alleged incompetence constituted prejudicial error, and further, the mere showing of "errors, omission or mistakes, improvident strategy, or bad tactics" is not alone sufficient. *Id*. Counsel is accorded a broad latitude in exercising his judgment for a client's defense. *Id*. Moreover, the Sixth Amendment does not guarantee that an appointed attorney will establish an exemplary rapport with the accused and does not guarantee that the appointed attorney will have a "meaningful attorney-client relationship" with the accused. *See Morris v. Slappy*, 461 U.S. 1 (1982).

Appellant failed to make the first required showing under *Strickland*, *supra*, in that Wells's performance was not deficient under an objective standard. Wells may have been inexperienced, but we cannot say that he was ineffective. For that matter, appellant failed to make the second showing in that there was not a reasonable probability that the outcome of appellant's trial would have been different absent any error committed by Wells. A general claim of ineffectiveness without showing that actual prejudice resulted will not warrant relief. *Malone v. State*, 294 Ark. 376, 472 S.W.2d 945 (1988). Finally, only those claims of ineffectiveness that were ruled upon by the trial court are preserved for appeal. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003). Matters left unresolved are waived and may not be raised on appeal. *Id*.

Affirmed.

GRIFFEN and NEAL, JJ., agree.